

Explanation of Proposed Amendments to Reform Commission's
Revision of the Federal Criminal Code

Section 109. We would include members of the military services in the definition of "public servant". The term public servant is used in sections 1113, 1115 and 1381, which specify certain felonies^{AND MISDEMEANORS} and defenses thereto which are no less likely to be committed by members of the military services than by others included in the Commission's definition.

Section 1112. In subsection (4)(a) we would change the definition and narrow it to a specific recognized category, namely, information which has been classified and its dissemination restricted under presidential authority. We believe the definition of national security information in the Commission's draft is so broad as to permit, at least in theory, prosecution for revealing information which could not affect the national security and which in fact might be common knowledge. We realize that with the change it will be no offense to reveal information which should be protected but which through mistake or omission has not been classified.

The word "classified" has been added as a modifier to the term "national security information" in sections 1112(1)(a) and (b), 1112(3), 1113 catch line and 1113(a) and (d) to conform with the definition change proposed for section 1112(4)(a).

Section 1112(4)(a)(v). We have deleted the modifier "security" before "intelligence" as having no certain meaning and possibly serving to confuse or narrow the kinds of intelligence protected.

Section 1112(4)(a)(vi). Our proposed revisions of section 1114 *(below)* would serve to reconstitute present section 798, and accordingly this subsection of the Commission draft dealing with classified communications information would be redundant.

Section 1112(4)(a)(vii). This subsection would be redesignated as subsection (vi). We would change the term "national defense" to "national security" to make this subsection consistent with the rest of the section.

Section 1113. Our addition of the word "classified" in the catch line and subsections (a), (b) and (d) have been explained above.

Our proposed deletion of the requirement that mishandling of classified national security information be in reckless disregard of potential injury to the national security of the United States is made in the belief that the requirements of the subsections to create criminality are adequate to withstand attack without it. The

inclusion of the reckless disregard requirement would seem to add a considerable and unjustifiable burden for the prosecution.

Section 1113(c) and (d). By the change in subsection (c) and the addition of our subsection (d), we would distinguish between the requirements placed upon a person having lawful possession of a classified document and a person having unauthorized possession of it. This would make criminal the mere retention of the document by a person having unauthorized possession; whereas, the Commission's draft would permit such a person to retain the document without committing an offense until such time as the Government became aware of the unauthorized possession and demanded delivery of it. We think this change will close an undesirable loophole.

Section 1114. All of the changes in this section are designed to modernize the language in conformity to recognized terms in the field of communications intelligence. Accordingly, "communications intelligence or classified cryptographic information" has been appropriately defined in subsection (3). This section recasts present section 798 and narrows the offense to disclosure as opposed to misuse. These proposed changes have been coordinated with the National Security Agency.

Section 1115. The offense of communication of classified information by a public servant would be broadened to cases where

the public servant communicates the information to any unauthorized person and the definition of the term "unauthorized person" has been added. The justification for this broadening of the offense is the fact that a public servant or former public servant knows or should know that classified information can be made available only to specifically authorized persons. He cannot reasonably fall back upon the defense that he did not recognize the sensitivity of the classified information, the restrictions on its dissemination, or the fact that the person he communicated it to was not authorized to receive it. A public servant or former public servant knows that he has an obligation to assure himself that a recipient of classified information is entitled to receive it. Basically this section is derived from 50 U.S.C. 783(b), under which Scarbeck was convicted, and it is strengthened by the District Court ruling and Circuit Court affirmation, that whether the document passed by Scarbeck was properly classified was not an issue to be determined by the court.

Section 1130. We would add this section providing for injunction proceedings on the basis of the fact that many or most offenses involving classified national security information cannot be dealt with effectively through criminal penalties. Irreparable harm may be done to the national security if there is no way to take action against a potential

offender before he commits his offense. Our recent success in obtaining an injunction against a former employee who would have published classified information strengthens our opinion that the injunction provision is a salutary one and at the same time provides valuable precedent for proceeding under such a provision in the future. United States of America v. Victor L. Marchetti, U.S.C.A. 4th Cir., No. 72-1586 (1972). Nevertheless, a statutory authorization for injunctive proceedings should lessen the burden on the Government and reduce the chances of a need to submit evidence which in itself could harm the national security.

Section 1352(2)(a). We would delete the requirement that a false official statement be in writing. The offense and potential injury may be identical whether a false statement is written or oral. We have also deleted "when the statement is material" which appears to be a modifier without an object.

Section 1381(1)(a). We believe this subsection retains its meaning and gains clarity by the deletion indicated.

Section 1381(4). The classification of the offenses appears to have been reversed inadvertently.